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No. 01-346

Supreme Court, U.S.
FILED
OCT 10 2001
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

VACANCES HELIADES S.A. AND NIMELIAS ENTERPRISES S.A.,
Petitioners,

v.

AAR INTERNATIONAL, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Petitioners Vacances Heliades S.A. and Nimelias Enterprises S.A. submit this reply to the Respondent's Brief in Opposition ("Opp. Br.") to Petitioners' petition for a writ of certiorari (the "Petition"). Review is sought to resolve conflicts among the federal courts of appeals regarding the weight to be given to a clause in a business agreement designating a forum for resolution of disputes about the agreement.

INTRODUCTION

In the Petition, we pointed out that different standards apply to the important question of whether a forum selection clause should be given dispositive effect or be considered as one factor with other factors, and that the answer to that question is guided differently in two opinions of this Court.

The Bremen v. Zapata Off-Shore Co., gives it dispositive effect, 407 U.S. 1, 15 (1972), and *Stewart Organization, Inc. v. Ricoh Corp.*, treats it as one factor. 487 U.S. 22, 29 (1988). The Respondent agrees: "The holdings of these cases demonstrate this Court's recognition that a different standard should apply when transfer is requested under 28 U.S.C. § 1404(a) from one federal district court to another, as opposed to when a *forum non conveniens* motion is brought seeking dismissal in favor of an alternative forum in foreign nation." Opp. Br. at 7.[1]

In our petition, we pointed out that confusion has resulted and that the courts of appeals are divided in two respects: first, as to whether to treat the forum selection clause as dispositive or only as one factor; and, second, how to characterize these clauses – whether the language of the forum selection clause designates only one forum or more than one forum and requires, or merely permits, the forum selection. Petition at 2-3. We pointed out that the decision of the U.S. Court of Appeals for the Seventh Circuit in this case raises both issues, and that the Seventh Circuit candidly observed that its decision conflicts with other courts of appeals on both issues. Petition at 6-10.

In its Brief in Opposition, Respondent argues that all of the decisions can be reconciled and that there are no conflicts. Opp.

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[1] The Respondent states that there are "essential differences" between the issues involved within the context of a motion to transfer venue pursuant to § 1404(a) and a motion to dismiss for *forum non conveniens*. Opp. Br. at 6. While Congress in § 1404(a) directed federal district courts to consider certain factors in deciding whether a case should be transferred, most of the factors that federal district courts consider in both contexts are judge-made and they are substantially similar. *See* 17 MOORE'S FEDERAL PRACTICE § 111.03 at *4, n.9 (transfer factors same as *forum non conveniens* factors); 17 Moore's Federal Practice § 111.13 at *4 (Section 1404); 17 Moore's Federal Practice § 111.74 at *8 (*forum non conveniens*); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947); and *Stewart*, 487 U.S. at 29.

Br. at 5-8. They cannot be reconciled, and the attempt to do so fails.[2]

ARGUMENT

I. There Is A Conflict Between The Seventh Circuit's Holding In This Case And The First Circuit's Holding in *Royal Bed*

The Seventh Circuit in this case stated it was following *The Bremen* and that the forum selection clause, which it deemed mandatory, was dispositive of the *forum non conveniens* motion as a matter of law. App. B (to the Petition), B - 24-25. The district court had not addressed the issue. App. B, B-19. By contrast, in *Royal Bed & Spring Co., Inc. v. Famoussul Indus. e Comercio de Moveis Ltda.*, the First Circuit said it was following *Stewart* and affirmed the district court's balancing approach. 906 F.2d 45, 51 (1st Cir. 1990). The First Circuit agreed with the district court's statement that the forum selection clause (providing for a Brazilian forum) "'should not receive a dispositive consideration . . . but should rather be considered a significant factor that will figure centrally in our balancing of factors.'" *Id.* at 47 (quoting the district court).

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[2] Respondent asserts that, "[r]ead in context," the "bizarre dichotomy" noted in the Petition (Petition at 6-7, n.4) that results from the conflicting enforcement of a forum selection clause in the context of a motion to transfer venue versus other motions, only occurs when "'the selected forum is another federal court.'" Opp. Br. at 6 – 7, n. 5. It is clear that the dichotomy also occurs when the selected forum is a foreign court. Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55, 71 (1992) ("A corollary to this is that if the selected forum is a foreign court or a state court, Stewart does not apply at all because a transfer motion is unavailable. Thus, assuming that Bremen applies in all federal court cases, forum selection agreements have more force in international agreements than they do in domestic matters.")

The First Circuit observed that this Court said in *Piper Aircraft Co. v. Reyno* that:

> 'the forum non conveniens determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.'

Id. at 47 (quoting 454 U.S. 235, 257 (1981)). The First Circuit applied this principle in deciding the case before it. It noted that "Stewart . . . teaches that . . . a district court . . . may . . . still `refuse to transfer a case notwithstanding the counterweight of a forum selection clause .. . .'" *Id.* at 51 (quoting *Stewart*, 487 at 30-31).

The First Circuit in *Royal Bed* then summarized the private and public interest factors weighed by the district court. *Id.* at 52. Royal Bed, a Puerto Rico corporation, distributes furniture products in Puerto Rico that were manufactured in Brazil by a Brazilian company. *Id* On the one hand, the district court in Puerto Rico "acknowledged that Royal Bed's choice of a forum was entitled to great deference since it chose a home forum," *id.*, and that all the sales took place in Puerto Rico to Puerto Rican accounts for use in Puerto Rico. *Id.*

On the other hand, the district court took into account that the contract was signed in Brazil and drafted in Portuguese and that Royal Bed was no stranger to the judicial system of Brazil since it previously litigated its disputes in the courts of Brazil and obtained favorable results. *Id.* "'Moreover, the contract contains a forum selection clause providing [for a Brazilian forum].'" *Id.* (quoting the district court, emphasis added).

The district court concluded that Brazil was the most convenient forum. The First Circuit stated that "the forum – selection provision . . . is not given dispositive effect. Rather, it is simply one of the factors that should be considered and

balanced by the courts in the exercise of sound discretion. See Stewart, 108 S. Ct. at 2245." *Id.* at 51. The Court of Appeals concluded: ". . . it is clear that the district court thoroughly considered and properly balanced all of the relevant public and private interest factors for a forum non conveniens dismissal. Since the balancing of these factors was reasonable, it cannot be said that the district court abused its discretion." *Id.* at 53.

The Brief in Opposition mischaracterizes the comparison of this holding of the First Circuit in *Royal Bed* with the holding of the Seventh Circuit in this case as "consistently reasoned." Opp. Br. at 5. Respondent's statement that the reason for the First Circuit's holding that the forum selection clause was only one factor to be balanced was because that clause was "non-exclusive" cannot be supported by *Royal Bed*. *Id.* Nothing in the First Circuit's opinion mentions "exclusive" or "non-exclusive."

Nor is there a basis for the statements in the Brief in Opposition that "the First Circuit ordered [the forum selection clause's] specific enforcement" or that "the First Circuit would have ordered the specific enforcement" of the forum selection clause in the instant case. *Id.* at 6. The First Circuit simply affirmed a district court's balancing of factors as reasonable and thus not an abuse of discretion. *Royal Bed*, 906 F.2d at 53.

The *Stewart* – inspired balancing approach in *Royal Bed* directly conflicts with *The Bremen* - inspired dispositve approach in the instant Seventh Circuit case and this conflict warrants review by this Court.[3]

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[3] The Seventh Circuit itself illustrated the conflict between the federal courts of appeals by noting that some of its "sister circuits" found forum selection clauses dispositive under this Court's decision in *The Bremen* in the consideration of a motion to dismiss for *forum non conveniens*, while another circuit court found such forum selection clauses to be one of several factors to be considered and balanced using this Court's analysis in *Stewart*. App. B-22 – B-23 (*comparing Evolution Online Sys., Inc. v. Koninklijke PTT Nederland N.V.*, 145 F.3d 505 (2d Cir. 1998) *and Mitsui & Co. (USA), Inc. v. Mira M/V*, 111 F.3d 33 (5th Cir. 1997) *with Royal Bed*.

II. There Is A Conflict Between The Seventh Circuit's Holding In This Case And The Second Circuit's Holding In *Blanco* And The Ninth Circuit's Holding In *Fil*

Respondent asserts that a provision in the forum selection clause in this case providing that neither party would challenge the other party's choice of forum in Illinois as inconvenient is outcome determinative in this case. Opp. Br. at 5, 6, 8, 9, and 10. Respondent calls this provision (for the first time in this litigation) a "Venue/Inconvenient Forum Waiver." *Id.* at 2. Respondent argues that the cases cited in the Petition as conflicting with the Seventh Circuit's decision in this case, *see* Petition at 8-9 (citing *Blanco v. Banco Indus. de Venezuela, S.A.*, 997 F.2d 974 (2d Cir. 1993) and *Fil Leveraged U.S. Government Bond Fund Ltd. v. TCW Funds Mgmt. Inc.*, 1998 U.S. App. LEXIS 17586, at *5 (9th Cir. July 29, 1998)), present no conflict because they do not involve such a provision. Opp. Br. at 8. In support of their argument that such a provision should be enforced, Respondent cites to a number of decisions of this Court enforcing agreements to arbitrate. Opp. Br. at 12-13. These cited decisions give effect to the strong federal policy supporting arbitration under the Federal Arbitration Act. There is no federal policy favoring a provision in a forum selection clause providing that a party will not object to a forum on the ground that it is not convenient. However, there is a strong federal policy in favor of certainty and predictability in forum selection clauses. *The Bremen*, 487 U.S. at 10-15. The agreement in this case, providing for venue virtually anywhere in the world, fails that policy. App. E., E-1.

It is hard to understand why language in a forum selection clause not to object to one of many possible venues should have any effect at all, much less turn a decision one way or the other. Presumably any such nonobjections would be implicit in the parties' agreement to the clause.

The negative implication of Respondent's argument (and of the holding as a matter of law by the Seventh Circuit in this case) is that in the absence of such a no-objection clause it is

appropriate for a party to object to a forum to which he has agreed by contract. *The Bremen* rejects that. *See* 407 U.S. at 16. The First Circuit so noted in *Royal Bed*:

> ...[A]ccording to the Supreme Court, a showing of inconvenience as to a foreign forum would not be enough to hold a forum selection clause unenforceable....Indeed, the Supreme Court stated specifically that 'it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.'

Royal Bed, 906 F.2d at 49 (quoting *The Bremen*, 407 U.S. at 18).

The only thing that such a clause adds is an artful drafting trap for businessmen and their lawyers and more confusion to an area of the law that should be predictable. This no-objection clause is of no relevance. If it is not given effect, both *Blanco* and *Fil* conflict with the Seventh Circuit decision in this case and warrant review by this Court.[4]

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[4] The Seventh Circuit itself acknowledged that, aside from giving effect to a no-objection provision, *Blanco* took a different view of a similar "nonexclusive" and "permissive" clause. App. B., B-24.

CONCLUSION

For the reasons set forth in the Petition and herein, it is respectfully requested that the petition for a writ of certiorari be granted.

Respectfully submitted,

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October 2001